APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1600, 1601—August Term, 1991

(Argued July 13, 1992 Decided Oct. 9, 1992)

Docket Nos. 91-1732, -1733

UNITED STATES OF AMERICA,
Appellee,

—v.—

BERNHARD FRED MANKO, also known as Fred;
and JON EDELMAN,
Defendants-Appellants.

Before: ALTIMARI, MAHONEY, and WALKER, *Circuit Judges.*

Appeal from judgment of conviction entered in the United States District Court for the Southern District of New York (Mary J. Lowe, *Judge*) on ground that district court's bias denied defendants a fair trial.

Affirmed.

EARL H. NEMSER (Kathryn L. Hoenig, Gary J. Mennit, Burton Spivak, Cadwalader, Wickersham & Taft, New York, NY of counsel) for *Defendant-Appellant* Manko.

MARION BACHRACH (Carro, Spanbock, Kaster & Cuiffo, New York, NY of counsel) for *Defendant-Appellant* Edelman.

ROBERT J. CLEARY, Ass't U.S. Atty, Southern District of New York (Otto G. Obermaier, U.S. Atty, Miguel A. Estrada, Daniel C. Richman, Ass't U.S. Atty's, Southern District of New York, of counsel) for *Appellee*.

WALKER, *Circuit Judge*:

On February 4, 1991, following a four-month jury trial in the Southern District of New York before Judge Lowe, Bernhard Fred Manko and Jon Edelman were convicted of making and subscribing false tax returns in violation of 26 U.S.C. § 7206(1), aiding and abetting in the preparation of false returns in violation of 26 U.S.C. § 7206(2), and conspiring to violate the tax laws and to defraud the United States in violation of 18 U.S.C. § 371. On November 25, 1991, the district court sentenced each defendant to five years imprisonment and fined each $450,000. On appeal, Manko and Edelman raise a host of objections to the district court's conduct of the trial. In addition, Manko and Edelman assert that the government failed to produce sufficient evidence to sustain their convictions and that prosecutorial misconduct denied them a fair trial.

BACKGROUND

Manko and Edelman were professionals in the once thriving field of tax shelters. In the late 1970s and early 1980s, the two sold interests in partnerships that engaged in complex commodities straddles. These straddles had the effect of creating losses in one tax year and a corresponding gain in the subsequent year, thereby deferring income. *See Gardner v. Commissioner*, 954 F.2d 836 (2d Cir.) (per curiam), *cert. denied sub nom. Falk v. Commissioner*, 112 S.Ct. 1940 (1992).

The straddle business evaporated when Congress passed the Economic Recovery Tax Act of 1981 ("ERTA"), Pub. L. 97-34 (1981). ERTA eliminated the tax benefits of straddles by requiring the taxpayer to recognize both the gain and the loss generated by the straddle in the same year. Manko and Edelman began to look for new tax deferral techniques.

Eventually, Manko and Edelman devised a way around ERTA. They determined that by engaging in repurchase transactions ("repos") in United States Treasury Bills ("T-Bills"), they could create interest deductions in the first tax year and corresponding gains in the second year, with little or no risk. A T-Bill is an obligation of the United States Government to pay a fixed amount (the face value) at a certain date in the future (maturity). T-Bills are purchased at a discount from face value. The interest is determined by the difference between the face value and the purchase price. A repurchase agreement is an agreement to sell a T-Bill and then repurchase the bill at a later date for a predetermined amount. In effect, a repurchase agreement is a loan in the amount of the proceeds of the original sale, collateralized by the T-Bill, with interest equal to the difference between the sale and repurchase prices. A repurchase agreement may expose the parties to market risk, since the agreed-upon repurchase price may be greater or less than the market price of the T-Bill at the agreed-upon date. A repo to maturity exists when the repurchase date specified in the agreement is the maturity date of the T-Bill. In a repo to maturity, there are no economic variables, since the market value of the T-Bill at maturity is always equal to the face value of the T-Bill.

Repos created tax advantages because, until the tax laws changed in 1984, a securities dealer could deduct the interest payments on the loan as they accrued, but only had to report the corresponding gain from the appreciation of the T-Bill at maturity. If the T-Bill matured in

the tax year after the repurchase agreement was made, the taxpayer would be able to defer income equal to the amount of interest accrued in the first year.

One problem with using repos to create tax deductions is that the deduction created in the first year is relatively small compared with the face value of the T-Bill. A repo on a ten million dollar T-Bill would only create a few hundred thousand dollars of interest deductions. Since Manko and Edelman had raised over $25 million from investors with a promise of generating four times that amount in tax deductions, they realized they would have to do huge quantities of repos to maturity.

At trial, the government asserted that Manko and Edelman hatched a fraudulent scheme in order to achieve such volumes. The government alleged that Manko and Edelman appropriated a dormant shell company, TSM Holding Company ("TSMH"), and unilaterally wrote documents to reflect billions of dollars of repos to maturity between TSMH and two clearing brokers controlled by Manko and Edelman—Government Clearing Company and Government Securities Trading Corporation (collectively "GCC"). In turn, Manko and Edelman created documents to reflect mirror transactions between GCC and several investment partnerships, thereby passing on the ersatz tax breaks to numerous unwitting investors. Manko and Edelman represented to their lawyers and accountants that TSMH was an independent entity and that all their transactions with TSMH actually occurred and carried market risk.

The documents introduced at trial described the trades as follows. First, TSMH would sell a T-Bill through GCC to the partnerships. Since TSMH was only a shell company without assets, TSMH would sell the bill short. In a short sale, a party sells a security that it does not own and must therefore find a way to deliver the security to the buyer, such as borrowing it from a third party. Since TSMH sold as much as a billion dollars worth of

T-Bills at a time, the partnerships lacked the funds to pay for the T-Bills. Accordingly, the partnerships would borrow the funds from GCC by entering into a repo to maturity with GCC secured by the T-Bill received from TSMH in the short sale. GCC, of course, did not have a spare billion dollars lying around to lend to the partnerships. Instead, GCC would borrow the funds from TSMH with a repo to maturity secured by the same T-Bill that TSMH had sold short to the partnerships and that the partnerships had loaned to GCC.

The return of the T-Bill to TSMH as collateral cancelled TSMH's obligation to deliver the T-Bill promised in the short sale. Therefore, at the end of the day, GCC would owe TSMH the proceeds of the loan plus interest and TSMH would owe GCC a T-Bill. Both obligations would come due at maturity. GCC would have mirror obligations with the partnerships. The terms of the repurchase agreements between GCC and TSMH exactly mirrored the terms of the agreements between GCC and the partnerships. At the end of the first tax year, GCC would "roll up" the outstanding interest payments on the loan by unilaterally adding them to the principal amount of the loan. The mirror transactions between GCC and the partnerships would proceed with a similar interest roll up, thus allowing the partnerships to take the tax deductions.

GCC set the interest rates on both loans so that the loan proceeds plus interest would exceed the face value of the T-Bill by a set amount—$50 per million at the outset. This money, in effect TSMH's fee for providing GCC with a tax deduction to pass on to the partnerships, was the only thing actually to change hands in the transactions.

The government presented a substantial amount of evidence that the transactions described above never took place—that GCC engaged in typing, not trading. First, from July of 1982 to September of 1982, there was no

one at TSMH with whom Manko and Edelman could negotiate the deals. Vincent Tese and James Sinclair (former partners of Manko) set up TSMH in June of 1982. Neither, however, ever injected any capital into TSMH or used the company in any way. Both denied any knowledge of the transactions between TSMH and GCC. During this period in which nobody controlled TSMH, Manko and Edelman had their trading room staff write up trade tickets that made it appear that TSMH had sold $500 million in T-Bills to GCC and loaned GCC the money to purchase them. GCC prepared but did not send confirmations reflecting the terms of these trades. Edelman admitted that GCC determined the size of the transactions and set the interest rate on the repo without negotiating with TSMH.

In October of 1982, perhaps in an effort to provide more substantial documentation of the "trades," defendant Manko hired Richard Bandel, a former employee of GCC, to work at TSMH. At Manko's instruction, Bandel picked up the confirmations that GCC had printed and logged into accounting ledgers all the trades that had been written up to that point. With Bandel in place at TSMH, GCC began sending trading confirmations to TSMH, and Bandel logged these transactions into TSMH's books. The defendants admitted that even with Bandel in place, GCC did not negotiate the terms of the transactions with TSMH.

At about the same time that Manko placed Bandel at TSMH, Tese and Sinclair transferred TSMH, free of charge, to Robert Maurus and Charles Genovese. Maurus testified that he did not even learn that Bandel worked at TSMH until March of 1983. Genovese testified that Manko informed him that TSMH needed Bandel in order to make TSMH "look like a real company."

After the transfer, Maurus and Genovese remained largely unaware of the details of the alleged transactions.

On redirect examination, Maurus conceded that he understood nothing about the transactions except that GCC wrote up the paper and TSMH received a fee. It was not until the Spring of 1983 that TSMH began to send reciprocal confirmation slips to GCC. By the time these confirmation slips were sent, most of the underlying T-Bills had already matured and the parties' obligations had already been settled. Genovese testified that these confirmation slips were sent for "cosmetic" reasons.

The pace of the transactions accelerated in November of 1982. Faced with the need to create almost $100 million in deductions by the end of the year, Edelman ordered John Mann, the chief trader for GCC, to write up $500 million and $1 billion transactions with TSMH. Edelman instructed Mann to set the price without contracting TSMH. Mann refused, with the explanation that he did not participate in transactions in which he did not speak to the other party. Eventually, Mann agreed to limited participation in the transactions, informing other trading room employees of the market price for T-Bills so that the correct amounts could be written on the trade tickets.

One GCC trading room employee testified:

> Right after the first billion dollars was decided on, it was just quiet right after, and then Joe Bryant [a trading room employee] said "this is the one that's going to get them." And John Mann and [another employee] and myself all agreed to that, and a few minutes later John Mann said, "it's gone too far now. The boys have gone too far."

At other times, trading room employees referred to the billion-dollar trades as "the straw that's going to break the camel's back." Employees also discussed the financial reward for turning Manko and Edelman in to the IRS.

After the first three days of the billion dollar trades, Mann informed Edelman that he "had legal reservations

about these trades and didn"t want to do them anymore." Mann testified that Edelman replied that the trades were "*none of* [Mann's] *concern*" and "that it was not [Mann's] job to be policeman for the world."

In fifteen days in November of 1982, GCC wrote $25 billion worth of T-Bill repurchase transactions with TSMH. After that, the pace of the scheme slackened, but GCC continued to write repurchase transactions until the tax laws changed in 1984. At the time of the billion dollar trades in November of 1982, TSMH had $33 in cash, $50 in office expenses, and no telephone bills. TSMH did not even have a bank account until the end of that month.

Eventually, Barbara Kanter, Edelman's personal assistant, opened an account for TSMH. Kanter then transferred millions of dollars into and out of TSMH's account. The defense alleged at trial that this money reflected interest payments from GCC to TSMH. However, Edelman acknowledged on cross-examination that he could not correlate any particular payment to interest owed on any loan. When Maurus and Genovese learned in the spring of 1983 that Kanter had been transferring money into and out of their account, they made no efforts to stop her. Genovese explained at trial that he felt the money did not belong to TSMH.

Faced with this powerful evidence that the purported transactions were shams that never took place, the defense contended at trial that TSMH had granted GCC discretion to make trades on TSMH's behalf, and thus that there was no need for GCC to seek TSMH's approval of the terms of the repo transactions. The defense never presented any direct evidence of such an agreement apart from Edelman's testimony that Manko told him that TSMH had granted GCC discretion to make trades.

The defense further argued that there was nothing strange about a corporation with no assets making billions

of dollars of loans because it was common in the government securities markets for undercapitalized entities to engage in highly leveraged, low-risk transactions.

The trial also proceeded on a second front. The government argued that even if the jury were to determine that the transactions actually occurred, the transactions were devoid of risk and thus lacked economic substance. Accordingly, the government contended that the transactions could not form the proper basis for tax deductions. The defense countered that so long as the repurchase loan represented a real debt, interest paid on that debt could be deducted even if the transactions as a whole lacked economic substance. The court sided with the government and charged the jury that it could convict if it found either that the transactions did not occur or that they lacked economic substance.

The trial in this extremely complex matter took four months. At the close of trial, the jury convicted Manko and Edelman on all counts. After the jury returned the verdict, the district court gave the jury a supplemental interrogatory that asked the jury to indicate whether it concluded that the transactions never took place or that the transactions lacked economic substance. After deliberating briefly, the jury announced that it had determined that the transactions never took place. This appeal followed.

DISCUSSION

On appeal, Manko and Edelman principally challenge the district court's handling of the trial. They contend that the court questioned witnesses in a way that suggested disbelief of the defendants' position, improperly held an *ex parte* conference with the prosecutor near the end of the trial, permitted the prosecutor to make improper comments in summation, and issued confusing instructions to the jury. Defendants suggest that the combined force of these asserted infirmities denied them a fair trial.

A. The Trial Court's Conduct

The district judge took an active role in the trial of this case, asking numerous and probing questions of witnesses. Such conduct is unquestionably proper—indeed, often required—in extremely complex cases. *United States v. Gurary*, 860 F.2d 521, 527 (2d Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989); *United States v. DiTommaso*, 817 F.2d 201, 221 (2d Cir. 1987); *United States v. Pisani*, 773 F.2d 397, 403 (2d Cir. 1985). However, such questioning carries with it the risk that the judge will appear partial to one side or the other. In order to avoid the appearance of partiality, a trial judge should limit questioning to inquiries necessary to clarify ambiguities, correct misstatements, or obtain information necessary to make rulings. *United States v. Mazzilli*, 848 F.2d 384, 388 (2d Cir. 1988).

The fact that a judge asks a question the purpose of which is not so limited will not always require reversal. Judges are human, and it is inevitable that in the course of long, complex, and hotly contested trials, a judge may on occasion react intemperately. A defendant is not entitled to a perfect trial, only a fair one. *United States v. Robinson*, 635 F.2d 981, 984 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981). Our ability to discern from a cold record whether particular statements of a trial judge rendered the trial unfair is quite limited. "[I]t is difficult to glean tone of voice, whether sarcastic or neutral, facial expression, whether reflecting disbelief or sober thoughtfulness, or physical demeanor, whether self-contained or expressing opinion and emotion. Therefore, it is only after an examination of the entire record that we can come to a conclusion about the conduct of the district court." *Mazzilli*, 848 F.2d at 389 (2d Cir. 1988).

The defendants point to several incidents in the trial that we quite frankly find disturbing. Nonetheless, after a careful review of the entire record, we conclude that

the district court's conduct did not deny defendants a fair trial.

1. *The District Court's Questioning of Jon Edelman*

A district court must show particular restraint in questioning a criminal defendant during the defendant's direct testimony. At this critical phase of the trial, the court must scrupulously insure that its questions do not indicate that the court doubts that the witness is telling the truth. *Mazzilli*, 848 F.2d at 388-89; *United States v. Victoria*, 837 F.2d 50, 55 (2d Cir. 1988). Impeaching the defendant is the job of the prosecution, not the court.

Here, the district court vigorously interceded in Edelman's testimony. Most of the court's questioning took the form of inquiry into precise details of the transaction. The court repeatedly sought to clarify whether GCC had made certain payments to TSMH in cash or by book entry. While the relevance of this distinction to whether the transactions took place or had economic substance is not entirely clear, our view upon reading the record is that the court's questions were aimed at pinning down this factual issue, not at casting doubt on defendant Edelman's credibility. Accordingly, we think this portion of the court's questioning of Edelman was proper.

We are more troubled by the court's questioning of Edelman with regard to financing arrangements between GCC and the investor partnerships. At one point, Edelman compared GCC's willingness to enter into a repurchase agreement with an investor partnership to allowing a customer to purchase securities on margin. The court asked a series of questions that undermined the analogy:

> [Edelman]: Yes, there is financing here and the best analogy I could make simply is to a financing on a margin account where you might have 100 shares of IBM you paid for, no money in your ac-

count, but fully paid for and you want to buy another 100 shares. You can do that.

The Court: Yes, you can, but if it's called you are expected to pay.

Edelman: If there is a margin call.

The Court: Yes.

[Edelman]: And the same thing is here, if my equity declines—

The Court: At any time in these whole 2 years we are talking about, did GCC or TSM ever call upon any of these partnerships to put money on any of these financing transactions?

[Edelman]: Can I answer that generically first?

The Court: Any way you want to.

[Edelman]: When an account at GCC has deficit equity, that is, that its value is less than the amount that it has borrowed, it has deficit equity, then GCC would be in a position to ask for more money. It may ask for more money, it may not.

The Court: That isn't my question. This is 1990. We are seven years down the road of the last transaction. In any of those two years, '82 or '83, did GCC or TSM ever ask any of these partnerships to put up money such as you were talking about a margin call in a stockbroker's account?

[Edelman]: With respect to the financing repo to maturity transactions, no other transactions?

The Court: Yes.

[Edelman]: I don't think so. GCC would be the person who would ask for money and I don't recall any situation where that was required.

[The Court]: That is the question I was asking.

By forcing Edelman to conceed that GCC never made a margin call, the court discredited Edelman's analogy to ordinary brokerage accounts. By undermining Edelman's testimony in this fashion, the court may have cast some doubt on Edelman's credibility. We note, however, that the court's questioning related to a collateral issue and

that Edelman's lawyer, upon resuming questioning, elicited testimony explaining that GCC would never need to make a margin call because the securities held as collateral for the repos, the T-Bills, were by their very nature always increasing in value as maturity approached. Thus, any doubts raised by the court's questions were quickly dispelled. While the court should not have challenged Edelman's analogy, since the challenge reflected as much on credibility as it did on factual clarification, we do not think this incident undermined the fairness of the trial.

2. *The Bandel Cross-examination*

We are also disturbed by the district court's conduct during the cross-examination of Richard Bandel, who testified for the government. The government's theory was that Bandel had been placed in TSMH by Manko to record the paper transactions in TSMH's books and that Bandel had no substantive role in determining the dimensions of the transactions.

The defense sought to discredit the government's view of Bandel's role in several ways. First, the defense asked Bandel to explain his testimony that Manko had hired him at TSMH in light of Bandel's prior statement in an affidavit that someone other than Manko had hired him to work at TSMH. Bandel, with some prodding from the district court, indicated that he stood by his testimony in court and that his present recollection was more accurate than that found in his prior affidavit. The defense also asked Bandel about his view of the transactions, perhaps in an effort to show that Bandel had some role in negotiating the deals:

> Q. [The Prosecutor] asked you about the large trades that occurred in November of 1982.
>
> A. Yes, he did.
>
> Q. And it's your testimony that you viewed those trades no differently than any others?
>
> A. Just that I was told—

The Court: By whom?

The Witness: By Joe Bryant, usually the day before I would get the ticket, that there were large tax trades going through.

Q. And it's fair to say the word "tax trade" was used openly?

A. Yes.

Q. And that based on your experience on Wall Street that many trades had a tax component?

Mr. Robinson: Objection.

The Court: This man was a scrivener, he wasn't a policy maker.

While prosecutor Robinson's objection was well taken, in that Bandel had not been qualified as an expert, the court's observation that Bandel "was a scrivener" was unnecessary and prejudicial. The government's theory was that Bandel was a scrivener, and evidence in the record supports this view. The district court, however, should not have endorsed the government's position.

The court repeated the error moments later:

Q. Did you ever tell Mr. Maurus or Mr. Genovese that you had any problems with these trades?

The Court: He has told us that when he found there might be errors, he spoke to Mr.—who did you sepak to about the errors in calculating the fees?

The Witness: The financing, Joe Bryant.

The Court: And Mr. Bryant and you got together and corrected whatever errors?

The Witness: Yes.

Q. My question was, did you ever tell Mr. Maurus or Mr. Genovese, when they took control of TSM Holdings, that you had any problems or concerns about these trades?

The Court: What kind of problems are you talking about? The man was a scrivener. That's the third time I repeated it. He knew nothing about the underlying transaction, and you're not going to

> ask questions to give the inference that he did when he has told you repeatedly he did not know.

The court thus explicitly and repeatedly endorsed the government's view of Bandel's role. Such a breach of impartiality is a matter of grave concern.

We cannot, however, conclude that the court's conduct denied Manko and Edelman a fair trial. First, defendants did not argue to the jury that Bandel negotiated the transactions. In closing argument defendants all but adopted the court's characterization, impeaching the accuracy of Bandel's testimony by stressing that after leaving Wall Street, Bandel went to work as a part-time starter at a golf course. Thus, defendants do not really dispute the accuracy of the scrivener label.

Second, the court properly instructed the jury that the jury's view of the evidence controlled, regardless of what the court said:

> With respect to factual matters, it is your recollection that controls. Nothing that counsel for either the government or the defendant may have said with respect to matters of evidence, either in their openings or in their summations, is evidence in this case; nor are any remarks that I may make during the course of this charge, or have made during the course of the trial—that is not evidence.
>
> * * *
>
> I remind you again that nothing I may have said, even my questions to witnesses during the trial when they were on the stand, those questions should be given no undue weight for their sole purpose was to clarify and aid you in understanding what the content of the testimony was to be. So you are to place no undue weight, one way or another, on the fact that I may have asked questions of witnesses.

In light of this extensive instruction and the fact that the court's statement concerned what proved to be an un-

contested issue, we do not think that the court's error denied Manko and Edelman a fair trial.

In sum, our review of the transcript confirms that on a few occasions the court crossed the line in questioning witnesses. In the context of a four month trial, we think the court's conduct did not indicate to the jury that the court believed that the prosecution should win. Accordingly, we reject defendants' contention that the trial court's conduct denied them a fair trial.

B. The *Ex Parte* Conference

Towards the end of the government's summation, one prosecutor initiated a conference with the district court, without the defense team. The conference was transcribed, but the district court sealed the record of the conference and refused to unseal the transcript until after the government's rebuttal summation. In this *ex parte* conference, the prosecutor advised the district court of his plan to use a chart in the rebuttal summation:

> The Court: What is it you have handed me, Mr. Cleary?
>
> Mr. Cleary: Judge, I just handed you a document I typed up headed "Excerpts of testimony." It lists witness's names and either quotations or paraphrases of their testimony. It's what I propose to use. It's a mockup of a chart I propose to use in my rebuttal summation.
>
> I bring this to you ex parte because I didn't want to let the defense know at this time before they sum up exactly what I am proposing to do in my rebuttal and I did want to apprise the court that I am planning on doing this so that your Honor could allot whatever time is necessary between the end of the last defense summation and the beginning of the rebuttal summation should there be objection to this. Because at that time I propose to give the defense

a copy of this mockup which contains references to the page of the transcript.

I should add, Judge, if you think it's more appropriate to disclose this information to them now, although I prefer not to I, of course, would go along with that.

The Court: No, I don't think you should disclose it. What I will do is I will check the places that you expect to use quotations or summations of testimony with the record so I will be in a position to rule if there are objections to your use.

Mr. Cleary: Thank you, Judge.

The Court: All right.

At the close of the defense summation, the government informed the defense of its intent to use the chart on rebuttal, and the court allowed the defense forty-five minutes to review the twenty-eight quotations and paraprases in the chart for accuracy. Defendants objected to the use of the chart and requested surrebuttal, but did not point to any specific inaccuracies in the chart. The court overruled defendants' objection and denied the request for surrebuttal. On appeal, the defendants assert that the *ex parte* conference denied them due process.

We note at the outset our inability to fathom why the prosecutor would jeopardize a four month trial with a wholly unnecessary *ex parte* conference. Such conferences "should not be conducted except in extraordinary circumstances." *United States v. Walsh*, 700 F.2d 846, 858 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983). No such extraordinary circumstances are present here.

The government lamely contends that the conference was for a proper purpose—to advise the district court of the government's plan to use a chart so that the court could allot proper time for argument between the defense summations and the government's rebuttal summation. But if that were all that the government wished to accomplish in the meeting, then there would have been no

need to show the court the chart the government planned to introduce. The government could have indicated, with defense counsel present, that it likely would have a chart in rebuttal which would require prior review. The only purpose for showing the court the precise quotes the government wished to use was to enable the court to review the chart for accuracy before the defense had an opportunity to present any arguments to the court. In short, the prosecution initiated this *ex parte* proceeding in a blatant attempt to win a tactical advantage, to get a "leg up." Unhappily, the district court went along with the prosecution.

That this *ex parte* conference was improper and unnecessary does not, of course, establish reversible error. *United States v. Persico*, 349 F.2d 6, 13 (2d Cir. 1965). Rather, "[t]he fact that such a meeting occurs . . . does not require reversal if it does not affect the fairness of the trial." *Walsh*, 700 F.2d at 858; *see also United States v. Moten*, 564 F.2d 620, 630 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977).

Defendants do not point to any inaccuracies in the chart. Nor do defendants identify any way in which the chart went beyond the scope of proper rebuttal. *Cf. United States v. Giovanelli*, 945 F.2d 479, 493-96 (2d Cir. 1991) (Newman, J., concurring). Defendants' contention that a chart prepared before the defense summation is necessarily beyond the scope of rebuttal is unpersuasive. The quotations reflected on the charts were all central to the case. The government could easily predict that defense summation would tread the same ground as the quotations. Thus, we are convinced that the district court acted properly in allowing the government to use the chart.

Of course, the propriety of using the chart cannot be the measure of whether the *ex parte* proceeding constituted reversible error. Otherwise, the fact of an *ex parte* proceeding would be irrelevant so long as the court ulti-

mately made the right ruling. Such a rule would not properly reflect our deep distrust for one-sided proceedings. Here, however, two facts convince us that reversal is not required. First, because the chart was clearly accurate and within the scope of rebuttal, there is no reason to believe that the district court would have ruled differently absent the *ex parte* conference. Moreover, even if the conference did influence the judge's decision to allow the chart, in the context of this four month trial, we doubt that this chart highlighting damaging testimony played even a minimal role in influencing the jury verdict. The prosecution presented substantial evidence that the transactions with TSMH never occurred. The chart at issue did not present any new information or any information that could not have been conveyed easily to the jury without the chart. Accordingly, we conclude that this highly improper *ex parte* conference does not constitute reversible error.

C. The Jury Instructions

Defendants raise a series of objections to the court's instructions to the jury. Principally, defendants argue that the court should have given all of the proposed charges submitted to the court by the defense on the afternoon of the charging conference. Most of the proposed charges concerned tangential legal issues that the government never disputed. In this lengthy trial, the court properly avoided burdening the jury with this extraneous information. Accordingly, we find most of defendants' contentions meritless. Defendants do raise three objections to the charge that warrant discussion.

1. *Ratification*

The defense argued at trial that the transactions between TSMH and GCC were real and binding even if TSMH did not grant discretion to GCC to perform trades, because TSMH subsequently ratified GCC's trading. The

district court, as part of a general charge on defense contentions, instructed the jury that "the defendants contend that TSM Holding ratified all transactions by subsequent conduct." The defense requested an additional instruction defining ratification. The court refused to give the proposed instruction. Defendants assert this refusal constitutes reversible error. We disagree.

A court may properly refuse to give a charge that fails to accurately state the law. *United States v. Paccione*, 949 F.2d 1183, 1200 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 3029 (1992). Here, defendants' requested charge stated that TSMH could ratify the acts of GCC "either by sending back confirmations to GCC, by failing to object to the transactions after TSMH received confirmations from GCC, or by any other conduct, such as recording the transactions as if they were done, indicating an intention to be bound by the transactions." The problem with this proposed charge is that under New York law, "[a]n agent's acts that are not valid unless performed pursuant to writing can only be ratified in writing." *Weston Associates, Inc. v. Niagara Properties, Inc.*, 130 A.D.2d 964, 965, 516 N.Y.S.2d 381, 382 (4th Dept. 1987). Here, the acts of the purported agent, GCC, contracting for the purchase of securities, would not be valid absent "some writing signed by the party against whom enforcement is sought." N.Y.U.C.C. § 8-319(a). Accordingly, TSMH could ratify GCC's authority only through a writing. The defendants' proposed instruction suggesting that TSMH could ratify through any conduct indicating an intent to be bound by the transactions failed to state New York law accurately. The district court correctly refused to give the proposed instruction.

2. *Economic Substance*

Defendants claim that they were prejudiced by a reversal by the trial court during the course of the trial on the issue of the proper definition of economic substance.

On the eve of trial, the court ruled that if the transactions were not "economically substantive indebtedness," the interest would not be deductible. Defendants claim that the trial court, at this time, rejected a two-part test for economic substance advanced by the government, instead adopting an open definition of economically substantive indebtedness, but then reversed itself in its charge to the jury by adopting the two-part test previously rejected. The two-part test with which the court charged the jury stated, in accordance with our decision in *United States v. Atkins*, 869 F.2d 135, 139-40 (2d Cir.), *cert. denied*, 493 U.S. 818 (1989), that a transaction lacks economic substance if it lacks a reasonable possibility of profit and lacks market risk. Defendants contend that the ambiguous term "economically substantive indebtedness" adopted on the eve of trial would encompass purely formal indebtedness, and that they relied on this notion in presenting their case. The defendants claim that this reversal constitutes a violation of the law of the case doctrine and they were prejudiced by it, since they relied on the earlier ruling in formulating their trial strategy.

While a trial court's reversal of its own ruling during the course of a trial may raise serious issues of prejudice, *see United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991), we doubt whether such concerns are raised here. Our review of the trial record suggests that, at the outset of the trial, the judge's ruling was limited to acknowledging that the question of economic substance was an issue in the case after first saying off the record that it would not be an issue. The judge did not provide the parties with a precise definition of economic substance until her instructions to the jury, when she employed the two-prong test of *Atkins*. On the eve of trial, the judge simply noted that the defense objected to the government discussing profit motive and market risk, but stated to the parties that in establishing whether or not there was economically substantive indebtedness, the parties

may present "whatever factors you believe are relevant in order to reach that legal conclusion . . . ." In light of this, the eventual jury charge defining economic substance as profit potential or market risk does not appear to us to constitute a reversal of a prior decision.

In any event, we need not decide whether there was a prejudicial reversal of a prior ruling of law by the trial court. In the special interrogatory, the jury found that the transactions "were fictitious and did not take place." That finding rendered the jury's understanding of the term "economic substance" irrelevant to the outcome.

3. *Prearranged Transactions*

Defendants contend that the court's charge implied that prearranged transactions are necessarily fictitious. Defendants argue that since all repurchase transactions are in some sense prearranged—in that the borrower sells the security to the lender and agrees in advance to repurchase the security at a later date for a set price—the court's charge effectively forced the jury to conclude that the transactions were fictitious.

Defendants focus particularly on the court's instructions with respect to the knowledge element of the filing false returns charge. The court advised the jury that the government did not have to prove actual knowledge. Instead, the court stated:

> you may find that a defendant knew that the transactions *were a sham* or *without economic substance* if you find, 1, that the defendant you are considering was aware of a high probability that the transactions *did not take place* or *were prearranged* and, 2, that the defendant acted with deliberate disregard for how or whether those transactions were carried out with a conscious purpose to avoid learning the truth on this subject. (emphasis added)

The defendants argue that this charge equated transactions that "did not take place" with transactions that "were prearranged."

However, we think the more natural reading of the above passage is that it equates transactions that "did not take place" with transactions that "were a sham" and equates transactions that "were prearranged" with transactions "without economic substance." Viewed in this light, we doubt the court's instructions prejudiced defendants. Elsewhere in the instructions the court advised the jury that "transactions may be arranged in an attempt to minimize taxes" and expressly stated that in order to lack economic substance, a transaction must "lack[] a reasonable possibility of profit apart from tax deductions, and . . . lack[] market risk."

More importantly, even if the charge confused the jury on this point, we are unable to see how this confusion prejudiced defendants, for the same reason that we find that defendants could not have been prejudiced by the trial court's alleged reversal on her instructions on economic substance. As noted above, the jury expressly found that the transactions "were fictitious and did not take place." This response to the special interrogatory removed the economic substance issue from the case. Any lingering confusion about whether prearrangement was synonymous with a lack of economic substance was irrelevant to the verdict. Accordingly, we reject defendants' challenges to the jury instructions.

Finally, defendants assert that the government failed to produce sufficient evidence to support the conviction and that prosecutorial misconduct in summation denied them a fair trial. We have considered these and the remainder of defendants' arguments and find them to be without merit.

CONCLUSION

The trial in this case challenged the resources of the district court. Through the months of testimony and the thousands of documents, the district court grappled with vigorous and experienced defense counsel and diligently struggled to ensure that the jury could follow the evidence and render a fair verdict. Not unexpectedly in a long trial, the court made some mistakes, and defendants did not receive a perfect trial. However, our thorough review of the entire record convinces us that the defendants did receive a fair one.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed Dec. 4, 1992]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of December one thousand nine hundred and ninety-two.

Docket Number: 91-1732
91-1733

UNITED STATES OF AMERICA,
Appellee,

v.

BERNHARD FRED MANKO, also known as FRED; and
JON EDELMAN,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant Jon Edelman

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

By: Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEFENDANT JON EDELMAN

Docket No. S89CR91-02(MJL)

[Filed Dec. 2, 1991]

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government ROBERT CLEARY the defendant appeared in person on this date 11/25/91 [X] WITH COUNSEL MICHAEL F. ARMSTRONG

FINDING AND JUDGMENT

There being a finding/verdict of [X]GUILTY. Defendant has been convicted as charged of the offense(s) of

Title 18, Section 371
Title 26, Section 7206(1)
Title 26, Section 7206(2)

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Count I Three years imprisonment, a fine of $250,000.00, $50.00 spec. ass. fee

Count two through seven and thirteen through twenty-eight One year imprisonment and a $50.00 spec. ass. fee on each count, sentences of imprisonment are concurrent with each other and concurrent with Count I.

Count twenty-nine One year imprisonment a fine of $100,000.00 $50.00 spec. ass. fee To run consecutive to sentence on counts one, two through seven and thirteen through twenty-eight.

Count Thirty One year imprisonment a fine of $100,000.00 $50.00 spec. ass. fee To run consecutive to sentence on counts one, two through seven and thirteen through twenty-eight and twenty-nine.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends.

s Mary Johnson Lowe
HON. MARY JOHNSON LOWE

Date 11-26-91

APPENDIX D

[6578] SEALED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S 89 Cr. 91

UNITED STATES OF AMERICA

v.

BERNARD F. MANKO, a/k/a "Fred"
and JON EDELMAN,

Defendants.

January 29, 1991
10:00 a.m.

Before:

MARY JOHNSON LOWE,

District Judge

(Robing room conference)

THE COURT: What is it you have handed me, Mr. Cleary?

MR. CLEARY: Judge, I just handed you a document I typed up headed "Excerpts of testimony." It lists witness' names and either quotations or paraphrases of their testimony. It's what I propose to use. It's a mockup of a chart I propose to use in my rebuttal summation.

I bring this to you ex parte because I didn't want to let the defense know at this time before they sum up exactly what I am proposing to do in my rebuttal and I did [6579] want to apprise the court that I am planning on doing this so that your Honor could allot whatever time is necessary between the end of the last de-

SEALED

fense summation and the beginning of the rebuttal summation should there be objections to this. Because at that time I propose to give the defense a copy of this mockup which contains references to the page of the transcript.

I should add, Judge, if you think it's more appropriate to disclose this information to them now, although I prefer not to I, of course, would go along with that.

THE COURT: No, I don't think you should disclose it. What I will do is I will check the places that you expect to use quotations or summations of testimony with the record so I will be in a position to rule if there are objections to your use.

MR. CLEARY: Thank you, Judge.

THE COURT: All right.

SEALED

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S 89 Cr. 91

UNITED STATES OF AMERICA

v.

BERNARD F. MANKO, a/k/a "Fred"
and JON EDELMAN,
Defendants.

January 30, 1991
10:00 a.m.

Before:

MARY JOHNSON LOWE,
District Judge

* * * *

[6824] MR.RITHOLZ: Your Honor, I just was shown the transcript for January 29, yesterday, which starts out pages 6578 and 6579 sealed.

MR. CLEARY: That was my conference with your Honor. I don't mind having that unsealed as soon as Mr. Ritholz completes his summation.

THE COURT: All right. Everything I do is on the record one way or another. You will see it as soon as you are finished.

MR. RITHOLZ: You don't think I should know it now before I finish summing up?

THE COURT: No.

MR. RITHOLZ: I won't suffer a prejudice.

THE COURT: The prejudice you will suffer will not be caused by what is sealed, all right?

[6825] MR. RITHOLZ: I must say I don't understand, but if that is your Honor's ruling—

THE COURT: There is no causal relationship between what is sealed and prejudice.

I wouldn't do that, Mr. Ritholz.

(Trial adjourned to January 31, 1991 at 10 a.m.)

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S 89 Cr. 91

UNITED STATES OF AMERICA

v.

BERNARD F. MANKO, a/k/a "Fred"
and JON EDELMAN,

Defendants.

January 31, 1991
10:00 a.m.

Before:

MARY JOHNSON LOWE,

District Judge

* * * *

[6940] (Open court; jury not present)

MR. RITHOLZ: I have an application.

THE COURT: Yes.

MR. RITHOLZ: This is an application with respect to certain material we were just shown for use by the government, which the government intends to use on rebuttal.

To be accurate—I have written this out—at first I asked that the court unseal the ex parte transcript—

THE COURT: Counsel, we can take this up after the rebuttal is completed.

MR. RITHOLZ: No, your Honor. I am opposing the use of this material, and I would like to get this on the record.

I think this is most important.

THE COURT: Go ahead, please state it as succinctly as possible; it's 5:30 now.

MR. RITHOLZ: I have been writing it out carefully, your Honor.

After completion of both defense summations, at 4:45 p.m. on January 31, defense is surprised with charts containing 28 quotations from the record, many not verbatim, and many not complete, and which has taken us this full hour just to try to verify.

This surprise, which we characterize as unfair, [6941] is a denial of due process in more than one way. It is unfair and incorrect procedure in that the court apparently heard an application for leave to do this ex parte on Tuesday morning, 12/29, even before defense summation commenced, and while the prosecution summation was under way, and gave an advisory opinion.

In the first place, fairness requires the prosecution to make an application on notice in open court with opportunity for the defense to make objection with oral argument, without the prosecution knowing in advance and ex parte the court's ruling, a ruling made without benefit of hearing both sides.

The charts are outside the scope of proper rebuttal. The court ruled on a scope-of-rebuttal question before defense summation had started and while prosecution summation was still under way.

THE COURT: Counsel, if you knew what the record was, you wouldn't be making these statements, but go ahead.

MR. RITHOLZ: This can be taken as directed to this in any event.

All of the material was available for use in prosecution summation and could have been included, and it should have been in order to give defendants fair opportunity to counter it and to avoid ambush.

This material is not proper rebuttal but yet [6942] another pre-planned summation and violated the rule against saving material for rebuttal.

I believe Judge Knapp precluded this very kind of conduct in U.S. against Friedman in 1986. We haven't had a chance to find the case for you, your Honor.

I want to give you just one example of what can happen here, and I don't know if it will. For our summation, defense summations, we had no particulars of the indictment on the question of secret oral agreement. Mr. Robinson spent no time on the issue of secret oral agreements leaving us, defendants, unable to sum up on it with particularity.

Any rebuttal on that subject would be entirely improper.

THE COURT: That is why I asked you to save this until afterwards because this is just conjecture that has no basis in fact.

MR. RITHOLZ: We are objecting to these very charts. I could have summed up on this, and this was available and they should have put it into his summation.

THE COURT: Summed up on what?

MR. RITHOLZ: On what they are quoting.

THE COURT: Do you know what is on the charts?

MR. RITHOLZ: Sure. We were shown it just notice [*sic*]. That is just against the rule of rebuttal.

[6943] THE COURT: We'll leave it until after the rebuttal is completed and the jury has gone home, and I will make my ruling and listen to any further argument.

Bring the jury in.

MR. RITHOLZ: Will he be permitted to show this to the jury?

THE COURT: Of course he will.

MR. RITHOLZ: But I object to that.

THE COURT: It's very clear on the record.

(Jury present)

THE COURT: Be seated, please.

Mr. Cleary.

MR. CLEARY: Thank you, your Honor.

Ladies and gentlemen, I am going to try—I'm going to try—to be brief in my rebuttal summation, and I am going to be very, very blunt.

* * * *

[6945] What I'm going to do during the course of my rebuttal summation is I'm going to put up on this chart which is headed "Excerpts of testimony of certain portions of the trial record," either paraphrasing testimony or [6946] quoting it verbatim.

The first one we have is Barry Lyman. "Mr. Manko said that there were so many other transactions, quote, that it would become impossible for anyone to come in and trace the tax trades.

MR. RITHOLZ: I object. The quote is not accurately quoted.

MR. CLEARY: That is one example.

MR. RITHOLZ: Objection.

THE COURT: Mr. Cleary, get the record and read the record.

MR. CLEARY: There is a word missing, which I'll add right now, which is "almost." The quote from the transcript at 557 is that I, Barry Lyman, was—

THE COURT: Read the question and the answer.

MR. CLEARY: Line 6.

"Q. Did Mr. Manko say what effect, if any, that would have, that is, the number of transactions that would be on the books of the partnerships?

"A. Yes. I was told that it would become almost impossible for anyone to come in and trace the tax trades" says Barry Lyman.

* * * *

[6985] MS. CHEPIGA: Objection to the last quotation that was put up. It misstates the record.

THE COURT: All right. Mr. Cleary.

MR. CLEARY: I will correct it, Judge.

* * * *

APPENDIX G

U.S. Department of Justice

[SEAL]

United States Attorney
Southern District of New York

One Saint Andrew's Plaza
New York, New York 10007

February 28, 1991

BY HAND

Honorable Mary Johnson Lowe
United States District Judge
United States Courthouse
Foley Square
Room 803
New York, NY 10007

Re: *United States v. Bernhard F. Manko and Jon Edelman*
S 89 Cr. 91 (MJL)

Dear Judge Lowe:

I am writing this letter to let Your Honor know that the Government has no objection to the Court unsealing trial transcript pages 6578-6579, transcribed on January 29, 1991, in the above-referenced case.

Respectfully,

OTTO G. OBERMAIER
United States Attorney

/s/ Stephen Craig Robinson
By: STEPHEN C. ROBINSON
Assistant United States Attorney
Tel.: (212) 791-1951

cc: Kathryn L. Hoenig, Esq.
Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, New York 10038

APPENDIX H

CONSTITUTIONAL PROVISIONS, RULE, AND CODE PROVISIONS INVOLVED

I.

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

III.

Rule 43 of the *Federal Rules of Criminal Procedure* provides:

> Presence of the Defendant
>
> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or
>
> (2) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.
>
> (c) Presence Not Required. A defendant need not be present in the following situations:
>
> (1) A corporation may appear by counsel for all purposes.
>
> (2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

IV.

The Code of Conduct for United States Judges, adopted by the Judicial Conference September 22, 1992, provides in part:

CANON 2. A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES.

A. A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not lend the prestige of the judicial office to advance the private interests of others; nor convey or permit others to convey the impression that they are in a special position to influence the judge. A judge should not testify voluntarily as a character witness.

CANON 3. A JUDGE SHOULD PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

A. *Adjudicative Responsibilities*

* * * *

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as

authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. A judge may, however, obtain the advice of a distinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

V.

The American Bar Association's Code of Judicial Conduct provides in part:

CANON 2. A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

CANON 3. A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of

the judge's office prescribed by law. In the performance of these duties, the following standards apply:

B. *Adjudicative Responsibilities*

* * * *

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers

in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

VI.

The American Bar Association's Model Code of Professional Responsibility provides in part:

Disciplinary Rule 7-110 Contact with Officials

(A) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.

* * * *

Ethical Consideration 7-35. All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not com-

municate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

VII.

The American Bar Association's Model Rules of Professional Conduct provide in part:

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

* * * *

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.